United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 754229

United States Court of Appeals

For the Second Circuit.

Docket Nos. 75-4229, 75-4251

GUAN CHOW TOK,

Petitioner,

-v-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

PAK SUEN STEPHEN LAI,

Petitioner,

-v-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

PETITIONERS' BRIEF

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Petitioners
515 Madison Avenue
New York, N.Y.
(212) 688-8555

JOSEPH P. MARRO
MARTIN L. ROTHSTEIN
Of Counsel

Dick Bailey Printers, Inc., Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES CITED

STATUTES CITED

REGULATIONS CITED

Code of Federal Regulations (C.F.R.):

United States Court of Appeals

For the Second Circuit.

Docket Nos. 75-4229, 75-4251

GUAN CHOW TOK,

Petitioner.

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PAK SUEN STEPHEN LAI,

Petitioner.

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONERS' BRIEF

Statement of the Issues

1. Whether the decision by the Board of Immigration Appeals to decline to exercise discretion and to order the mandatory deportation of the petitioners constituted error where the respondent had promised not to deport the petitioners in return for their demonstrated cooperation.

2. Whether mandatory deportation of a permanent resident of the United States for conviction of a drug related offense constitutes a violation of his constitutional right to equal protection of the law under the Fifth Amendment.

Statement of the Case

Pursuant to Section 106(a) of the Immigration and NationalityAct (the "Act"), 8 U.S.C. Section 1105a(a), the petitioners, Guan Chow Tok (hereinafter, "Tok"), and Pak Suen Stephen Lai (hereinafter, "Lai"), petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals on September 12, 1975. That decision held that the petitioners, both lawful permanent residents of the United States, were mandatorily deportable for conviction of a drug related offense (A. pp. 1-5).*

Tok filed his petition for review on October 24, 1975 and the petitioner, Lai, filed his petition on November 20, 1975. Because both petitions raise identical issues of law, both were consolidated by stipulation and order of this Court, dated January 30, 1976.

Statement of the Facts

The facts pertaining to each petitioner are as follows:

GUAN CHOW TOK

The petitioner, Guan Chow Tok, is a male alien, a native and citizen of the People's Republic of China. He was admitted to the United States on June 11, 1969 as a lawful

---

*References preceded by the letter "A" refer to pages in the Appendix, filed in this Court.

permanent resident (T.10, p. 8).* He resides in the United States with his wife and four children (ages 23, 19, 15 and 14), all of whom are lawful permanent residents of this country (T.10, p. 9). Tok is the owner of a garment factory in New York City and supports his family solely from the income derived from this business (T.10, p. 9).

On January 3, 1973, Tok was convicted in the United States District Court for the Southern District of New York of a conspiracy related to narcotic drugs and for unlawful possession with intent to distribute drugs (T.11). As a result of this conviction he was sentenced to a period of confinement and is now released on parole.

Following his conviction, deportation proceedings were instituted against him by the Immigration and Naturalization Service (hereafter, the "Service"), and Tok was served with an order to show cause, dated March 29, 1973. The order to show cause alleged that Tok was deportable under Section 241(a)(11) of the Act, 8 U.S.C. Section 1251(a)(11), as an alien who had been convicted of violating or conspiring to violate a law relating to the illicit possession of narcotics (T.12 and A.p. 11). At his deportation hearing Tok conceded the factual allegations in the order to show cause (T.10, p. 4), but he did not concede deportability (T.10, p. 6). Instead, he requested that the Immigration Judge exercise discretion on the issue of deportability (T.10, p. 6). In support of his request that discretion be exercised in his favor, Tok testified to the extreme hardship that he and his family would suffer if he were deported (T.10, pp. 8-10), and he testified to the

---

*References preceded by the letter "T" refer to tab numbers and pages in the certified administrative record pertaining to Tok, which was filed in this Court.

assistance he had given law enforcement officers which resulted in the conviction of two named individuals (T.10, p. 14).

At the conclusion of the deportation hearing, the Immigration Judge declined to exercise any discretion on the theory that he lacked authority to do so and ordered that Tok be deported to Hong Kong (T.8 and A. p. 6). Following an administrative appeal, the Board of Immigration Appeals affirmed the order of the Immigration Judge by its decision of September 12, 1975 (A. p. 15).

PAK SUEN STEPHEN LAI

The petitioner, Pak Suen Stephen Lai, is an alien, a native of Hong Kong and a subject of the United Kingdom and its colonies (L. 8, p. 6).* He last entered the United States on December 7, 1970 as a lawful permanent resident. He is married to Judy Lai, a permanent resident alien, and they have one child, born on February 1, 1975, a United States citizen by virtue of her birth (L. 8, p. 12). Lai is presently gainfully employed as a waiter in a restaurant in New Jersey (L. 8, p. 13).

On January 23, 1973, Lai, unaware of the deportation consequences of his action (L. 3, p. 14), pleaded guilty in the United States District Court for the Southern District of New York to the charge of unlawfully possessing a narcotic drug with intent to distribute (L. 11). As a result of this plea, the Service commenced deportation proceedings against him by issuing an order to show cause and notice of hearing. The charge contained in the order to show cause

---

*References preceded by the letter "L" refer to tab numbers and pages in the certified administrative record pertaining to the petitioner, Lai, which was filed in this Court.

alleged that because of the conviction for possession of a narcotic drug with intent to distribute, Lai was deportable from the United States pursuant to Section 241(a)(11) of the Act, 8 U.S.C. Section 1251(a)(11). (L. 9, A. p. 17).

A deportation hearing was held on February 7, 1975 before an Immigration Judge of the Service. Although Lai conceded the factual allegations contained in the order to show cause, he also did not concede deportability on the ground that the Immigration Judge has discretionary authority to determine whether an alien should be deported pursuant to Section 241(a)(11) of the Act 8 U.S.C. Section 1251(a)(11). Additionally, Lai moved to terminate the proceedings on several grounds but these motions were denied by the Immigration Judge (L. 8, pp. 8-9).

In connection with his request that discretion be exercised in his favor, Lai testified to the hardship that he and his family would suffer if he were to be deported (L. 8, pp. 12-13), and that he was presently employed (L. 8, p. 13). He further testified that on several occasions, he was approached by law enforcement officers of the Drug Enforcement Administrator and the Service who requested his cooperation in return for a promise not to deport him (A. pp. 19-25 and L. 8, pp. 16-22A). In reliance upon this representation, Lai provided valuable information and assistance, including acting as an undercover agent at a great personal risk to his own safety. The Immigration Judge held, however, that he had no discretion with respect to the issue of deportability and ordered that Lai be deported to Hong Kong (A. pp. 14-16 and L. 7, pp. 1-3). That order was affirmed by the Board of Immigration Appeals by its decision of September 12, 1975 (A. p. 15).

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended

Section 241, 8 U.S.C. Section 1251

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marijuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

. . .

ARGUMENT

THE PETITION FOR REVIEW SHOULD BE GRANTED AND THE ORDER OF DEPORTATION SET ASIDE

POINT I

THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETION BY NOT CONSIDERING THE EVIDENCE OF RECORD PERTAINING TO PETITIONERS' DEMONSTRATED COOPERATION AND THE PROMISE THAT THEY WOULD NOT BE DEPORTED.

In 1971, the United States Supreme Court rendered a landmark decision in *Santobello v. New York*, 404 U.S. 257 (1971), wherein the Court held the prosecuting sovereign to the standard of justice and fairness that it sought to uphold. There the Court reversed a plea of guilty where the state failed to keep an agreement concerning a recommendation for sentence. In remanding the matter to the appropriate state court for further consideration and fact-finding, the Court indicated that the only possible remedy that might be available was to direct specific performance of the agreement (at p. 263).

Recently, the Fifth Circuit had occasion to consider the effect of a similar agreement made to an alien as well as a promise not to deport her. In that case, in return for a plea of guilty and her testimony on behalf of the prosecution, the Government represented that it would use its best efforts to grant her an early parole and promised that she would not be deported to either of two countries. When the

Government reneged on its promise, the District Court granted a writ of habeas corpus and ordered specific performance of the agreement. The Fifth Circuit remanded the matter for further proceedings but again issued the admonishment that, "Specific performance may well be the only way out to keep the bargain." *Geisser v. United States*, 513 F.2d 862, 871 (5th Cir. 1975).

In the present case, the Board attempted to avoid the entire issue by its feeble conclusion that there was no evidence in the record to demonstrate that any promise was made. This determination is totally incorrect.

With respect to the petitioner, Tok, he testified at his deportation hearing that he twice gave testimony for the Government and that as a result of his efforts, both defendants were convicted and received increased sentences (A. p. 13). With respect to the petitioner Lai, the evidence of record is even more compelling. Lai testified that while he was in prison following his arrest, he was contacted by agents of the United States Government (A. p. 20). In further amplification of his testimony, Lai identified one of the individuals whom he had spoken with as Alan Kelly (A. p. 20). He further testified that based on his agreement to cooperate, his bond was reduced from ten thousand dollars to only one thousand dollars (A. pp. 20-21).

In the course of fulfilling his bargain, Lai attested to the fact that he had identified various locations of suspected criminal activity in Chinatown (A. p. 21). Furthermore, Lai testified that he had twice acted as an undercover agent for the Government in making a buy of narcotics (A. p. 21). In assisting the Government, Lai met with a particular individual at a social club in Chinatown and purchased a small quantity of heroin. On a second occasion, he met

with the same person in a restaurant in Chinatown and again made a small purchase of heroin. As a result of his efforts, Lai subsequently learned that the individual was apprehended and sentenced to a lengthy jail term. In spite of his demonstrated cooperation at a great risk to his own personal safety, the Government is now attempting to ignore its part of the agreement. To further support his assertion that he had rendered valuable assistance to law enforcement efforts, Lai offered into evidence a portion of the transcript of his sentencing wherein Judge Edward Weinfeld, United States District Judge for the Southern District of New York, specifically took cognizance of Lai's cooperation and imposed a lesser sentence upon him (A. p. 28).

Additionally, Lai testified that while serving his sentence he was again approached by federal law enforcement officials who solicited his cooperation (A. p. 22). In return for the promise to help him avoid deportation, Lai again agreed to cooperate and met with officials of the Immigration & Naturalization Service upon his release on parole. Again, Lai identified them by name as Mr. James Roland and Mr. Bob McByrne (A. p. 24) and he testified to the extent of his cooperation (A. p. 25).

Having testified under oath as to the nature and scope of the promises made to him, the identity of the Government officials (some of whom were employees of the Service and under its control) and the type of cooperation given, the petitioner has carried his burden and it was then incumbent upon the Service to come forward with evidence to refute this. However, the Service remained silent and did not offer any contradictory evidence. Accordingly, the bland assertion by the Board that there was no evidence showing any promise by the Government is completely erroneous and contrary to the record in this case.

The petitioners also assert that it is now well settled that the doctrine of equitable estoppel may be applied against the United States in order to prevent injustice and when elementary fairness requires it. *Moser v. United States,* 341 U.S. 41 (1951); *C.F. Lytle v. Clark,* 491 F.2d 834 (10th Cir. 1974); *United States v. Lazy F.C. Ranch,* 481 F.2d 985 (9th Cir., 1973); *Gestuvo v. District Director of U.S. Immigration & Naturalization Service,* 337 F.Supp. 1093 (C.D. Cal. 1971). Moreover, the Court will apply the doctrine of estoppel against the Government to require it to stand behind its agreements and in order to prevent a manifest injustice to the other party. *Walsonavich v. United States,* 335 F.2d 96 (3rd Cir., 1964).

Thus, in reliance upon the Government's promise not to deport them, the petitioners provided valuable assistance and even placed their own safety in jeopardy. Now, it would appear that after they have fulfilled their part of the agreement, the Government is unwilling to abide by its commitment. Certainly, under fundamental principles of elementary fairness, where the petitioners have acted to their detriment in reliance upon the Government's promise, the Court can order specific performance of the agreement or estop the Government from enforcing the petitioners' deportation.

POINT II

IF A LAWFUL PERMANENT RESIDENT, CONVICTED OF A NARCOTICS OFFENSE, IS INELIGIBLE TO APPLY FOR ANY DISCRETIONARY RELIEF FORM DEPORTATION, HIS MANDATORY DEPORTATION UNDER SECTION 241(a)(11) OF THE ACT VIOLATES HIS FIFTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAW

Congress, in enacting Section 241(a) of the Act, 8 U.S.C. Section 1251(a), has defined the general classes of aliens that are subject to deportation "upon the order of the Attorney General" of the United States. The statute contains eighteen subdivisions, each pertaining to a particular ground for deportation, including, *inter alia*, aliens who were excludable upon their last entry (subdivision 1), aliens who entered without undergoing inspection or who simply overstayed their lawful period of admission (subdivision 2), aliens who are Communists (subdivisions 6 and 7) or prostitutes (subdivision 12), and aliens who have been convicted of certain crimes (subdivisions 4, 11 and 14).

Although the scope of Section 241(a) of the Act, 8 U.S.C. Section 1251(a), is extremely broad, Congress has not differentiated between aliens who are nonimmigrants and those aliens who are not yet citizens but who have been lawfully admitted to the United States as permanent residents. Furthermore, in other subsections of Section 241 of the Act as well as under various other provisions of the statute, Congress has provided for discretionary relief from

deportation. However, the Board, in its decision of September 12, 1975, declined to consider any possible ground for discretionary relief.

Initially, we note that the petitioners do not question the right of Congress to make the conviction of a narcotic related offense a ground for deportation as it has long been held that Congress has the right to prescribe the terms and conditions of an alien's right to enter or remain in the United States. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Galvan v. Press*, 347 U.S. 522 (1954); *Van Dijk v. Immigration and Naturalization Service*, 440 F.2d. 798 (9th Cir. 1971). But see: *Mow Sun Wong v. Hampton*, 500 F.2d 1031, 1036 (9th Cir. 1974). The petitioners contend, however, that to order their deportation without considering all the facts and equities present in each case, denies them equal protection of the law in that *citizens* of the United States who are convicted of the identical offense have no additional penalty imposed upon them and *other aliens* who are deportable on different grounds, are afforded discretionary relief which is not available to petitioners. Furthermore, the petitioners argue that by the very terms of the statute itself, deportation is never mandatory or automatic.

The Supreme Court recognized long ago that once an alien has attained the status of a lawful permanent resident who physically remains in the United States, he is a person within the Fifth Amendment to the Constitution and entitled to its protections. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). Moreover, it is equally well established that the guarantee of equal protection of the law applies to both citizens and aliens residing within the United States. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Commission*, 334 U.S.

410 (1948).*

Under Section 241(a)(11) of the Act, 8 U.S.C. Section 1251(a)(11), in addition to other sanctions provided by law, an alien who is convicted of a drug related offense, becomes deportable from the United States. On the other hand, a citizen of the United States, who engages in exactly the same conduct and is convicted of a drug related offense, may receive no greater punishment than the maximum sentence provided by statute. In short, permanent resident aliens who commit the same crime as United States citizens are subject to the additional agonizing penalty of deportation.

In its most recent pronouncements in the immigration field the Supreme Court has emphatically held that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution" and that in the immigration area, as in any other, "a resolute loyalty to constitutional safeguards" is required. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 273, and 275 (Mr. Justice Powell, concurring), (1973); *United States v. Brignoni-Ponce*, ——U.S.——, 95 S.Ct. 2574, 45 L. Ed. 2d 607, 614 (1975). The Supreme Court has also recently instructed that the determination of the constitutionality of an Act of Congress subject to an equal protection challenge must be made in light of the actual purpose of Congress. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jiminez v. Weinberger*, 417 U.S. 628 (1974). See also: *Mow Sun Wong v. Hampton, supra.*

The obvious purpose of Section 241(a)(11) of the Act, 8 U.S.C. Section 1251(a)(11), is designed to protect society from drug offenders and to prevent the distribution of

* In reviewing the scope of the equal protection principles of the Fifth Amendment's Due Process Clause, the Supreme Court has recently reaffirmed that it is equivalent to that of the Fourteenth Amendment's Equal Protection Clause. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Johnson v. Robinson*, 415 U.S. 361, 364 n. 4 (1974).

drugs to law-abiding individuals. However, to mandate the deportation of a permanent resident alien without considering the question of his rehabilitation or other equities goes unnecessarily beyond the clear purpose of the statute as stated above. Furthermore, there does not appear to be any rational basis for believing that a lawful permanent resident alien with substantial family ties in this country is any more dangerous than a citizen in a similar situation.

In light of the Supreme Court's recent decisions in *Sugarman, Griffiths* and *Graham, supra,* the petitioners contend that their automatic deportation constitutes a denial of equal protection of the law and we further submit that there can be no rational basis for arbitrarily differentiating between citizens and permanent resident aliens convicted of identical crimes which *automatically* justifies the imposition of the additional penalty of banishment upon the latter. As the three judge court in *Diaz v. Weinberger,* 361 F.Supp. 1 (S.D. Fla. 1973) appropriately stated:

> America once held her arms open wide, beckoning other lands to "[g]ive me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shores . . . " Although it may be, as some cynics have remarked, that this is exactly what she got, to the extent our nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens. (361 F. Supp. at p. 17).

The petitioners also contend that to deny them any discretionary consideration and to direct their deportation denies them equal protection of the law since other aliens, including aliens who were originally admitted as nonimmigrants, have discretionary remedies available to them.

For example, under Section 241(b) of the Act, 8 U.S.C. Section 1251(b), certain aliens convicted of crimes are not deportable; under Section 241 (f) of the Act, 8 U.S.C. Section 1251(f), certain aliens who procured visas or other entry documents by fraud are also not deportable; under Section 244 and Section 245 of the Act, 8 U.S.C. Section 1254 and 1255, deportable aliens may apply for suspension of deportation and/or adjustment of their status to that of a permanent resident; under Section 212(c) of the Act, 8 U.S.C. Section 1182(c), aliens who are excludable, including aliens convicted of narcotics offenses and who have resided in the United States for seven years are eligible for discretionary relief.* Even more startling is the fact that aliens who have been convicted of murder, rape, armed robbery or other crimes involving moral turpitude can be granted a waiver of a ground of exclusion and admitted to the United States for permanent residence under Section 212(h) of the Act, 8 U.S.C. Section 1182(h).

Thus, almost every category of deportable or excludable alien, even those originally admitted as nonimmigrants, are eligible to apply for some form of discretionary relief if they have the necessary equities, which in most cases is a citizen or permanent resident spouse, parent or child. However, in its decision and order of September 12, 1975, the Board of Immigration Appeals refused to consider the equities in each case, including their long marriages to permanent resident spouses, the fact that they each had citizen or permanent resident children or any of the other equities in their favor. Rather, the Board rejected any consideration of discretionary relief and held that the petitioners were mandatorily to be deported under Section 241(a)(11) of the

---

* The applicability of this provision to deportable aliens is presently *sub judice* in this Court. *Francis v. Immigration and Naturalization Service*, Docket No. 74-2245.

Act, 8 U.S.C. Section 1251(a)(11). (A. pp. 1-5). Thus, the petitioners contend that to deny them any discretionary consideration while affording such to other classes of aliens, constitutes a denial of equal protection of the law.

POINT III

THE IMMIGRATION JUDGE HAS AUTHORITY TO GRANT DISCRETIONARY RELIEF FROM DEPORTATION

Notwithstanding the petitioner's equal protection argument, the Board of Immigration Appeals rejected their application that they not be deported and affirmed the decision of the Immigration Judges, concluding that under Section 241(a)(11) of the Act, deportation is mandatory. However, this conclusion is directly contrary to the language of the courts in *United States v. Follette*, 272 F. Supp. 563 (S.D.N.Y. 1967), and *United States v. Santelises*, 476 F.2d 787 (2d Cir. 1973).

In *United States v. Follette, supra*, the plaintiff, a United States citizen, brought an action to compel the Service to have him deported to Cuba. In rejecting his request as frivolous, the Court held, *inter alia*, that under the deportation statutes (8 U.S.C., §§1251, 1254) the Attorney General *has discretion* whether to deport an alien or not and he cannot be compelled to act in either way (272 F. Supp., at 565). So too, this Court in evaluating a plea of guilty without being informed of the possible deportation consequences thereof, held:

> Moreover, we should emphasize that deportation under Section 1546 is not "automatic". Although 8 U.S.C. Sec. 1251(a)(5) does allow deportation of any alien . . . deportation results, however, only

> upon "order of the Attorney General" who retains discretion whether or not to institute such proceeding.

United States v. Santelises, 476 F.2d at 790.

To contend, as the Board in its decision claims, that the exercise of discretion by the Attorney General is confined to a determination whether to commence proceedings and is similar to prosecutorial discretion, is in practice, absurd. In fact, once the processing unit of the deportation branch of the Immigration Service becomes aware of a deportation situation, the mechanism automatically is triggered and an order to show cause is issued. A perfect example of the situation as it exists is presented by the facts of both cases. The orders to show cause in both the cases of Tok (A. p. 11) and Lai (A. p. 17) were issued immediately after they were convicted and were served upon them while they were incarcerated. No prior interview was held, nor were the petitioners advised of the contemplated action. In fact, no discretion was ever contemplated in either of these cases as it is simply the policy of the Service to automatically issue the order to show cause and to leave discretionary applications to be considered at the deportation hearing. The petitioners submit that the decision by the Board, that it lacked authority to exercise discretion, is erroneous and that possible remedies available to petitioners were arbitrarily disregarded and not even considered.

The petitioners further submit that the discretion which the Courts in *Santelises* and *Follette, supra,* stated is inherent in the Attorney General, has been delegated to the Immigration Judge, who, as a quasi-judicial officer, possesses broad discretion to determine questions affecting the deportation of aliens from the United States.* In order

* On April 4, 1973, the Attorney General published a regulation (38 F.R. 8590) changing the title of the administrative hearing officer from Special Inquiry Officer to Immigration Judge, thus evidencing the importance and judicial nature of that office.

to fully evaluate the scope of the office of Immigration Judge, it is appropriate to review the present statutory and regulatory provisions which create and shape that office. In Section 242(b) of the Act, 8 U.S.C., Section 1252(b), Congress has provided that:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation."

Additionally, in the same section, Congress has provided that no Special Inquiry Officer (now called Immigration Judge) may conduct a proceeding in any case in which he participated in investigative or prosecuting functions.

Section 242(b) indicates clearly that Congress intended to create an important and independent judicial office of "Immigration Judge" operating within the Service, and that, by *statute*, such office has been vested with the power to consider and adjudicate issues related to "deportability" of aliens in the United States. It is also clear, however, that Congress left to the authorization of the Attorney General, the nature of the "determinations, including orders of deportation" to be made by the Immigration Judge in the course of the deportation proceedings. Hence, it is necessary to evaluate in depth those sections of the Code of Federal Regulations relating to the powers of the Immigration Judge.

In 8 C.F.R. 242.8(a), the Attorney General has delineated the authority of the Immigration Judge in deportation proceedings as follows:

"(a) Authority. In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation as provided by section *242[b]* of the Act: to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under Sections 244, 245 and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act, and *to take any other action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case.* A special inquiry officer shall have authority to certify his decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact *Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act.*" (Emphasis added).

The above language leaves no doubt that the Attorney General has interpreted Section 242(b) of the Act in the *broadest* possible light, and has delegated power to the Immigration Judge to the fullest extent contemplated by that Section. Not only has the Immigration Judge been given power to make determinations under the enumerated sections of the Act (Sections 244, 245 and 249), but he has also been granted the power to *"take any other action consistent with the applicable provisions of law and regulation as may be appropriate to the disposition of the case."* It is difficult to conceive of a broader and more encompassing delegation of power than the foregoing.

During the course of the deportation hearing, both Tok and Lai requested that discretion be exercised in their favor

and that they not be deported. In support of these applications, the petitioners sought classification into the nonpriority case category. The authority for nonpriority treatment is not found in any statute or regulation but is embodied in the Service's internal operations manual—the Operations Instructions [Section 103.1(a)(1) (ii)]. Nonpriority case treatment can be employed where "adverse action would be unconscionable because of the existence of appealing humanitarian factors". Although the Operation Instruction states that such action may be initiated by the District Director of the Service, the petitioners argue that because of the judicial nature of the Immigration Judge and the vast scope of his discretionary authority discussed above, he is empowered to grant this relief where the facts and equities warrant it. The petitioners submit, that the Board's decision declining to exercise this authority is erroneous and as such constitutes an abuse of discretion.

Although deportation has been held not to be penal in nature, Courts recognizing the severity of its consequences to spouses and immediate relatives of deportable aliens, has construed the deportation statutes most favorably to aliens. As the Supreme Court recognized, "deportation is a drastic measure and at times the equivalent of banishment or exile". *Delgadillo v. Carmichael* 332 U.S. 388, 391 (1947). Again, the Court in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), stated with regard to deportation that:

> It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provisions less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

So too, this Court has also recognized the drastic consequences of deportation:

> Deportation is not, of course, a penal sanction. But in severity it surpasses all but the most Draconian criminal penalties.

Lennon v. Immigration & Naturalization Service, —— F.2d——, Docket No. 74-2189 (decided, October 7, 1975).

Furthermore, a recent decision of the District Court in Illinois, fully appreciating the effect of deportation upon an alien and his family, granted a writ of habeas corpus in favor of the petitioner and set aside an order of deportation. There the Court held that aliens placed in deportation proceedings are entitled to basic constitutional protections and that under the circumstances of that case, the deportation of the alien constituted cruel and unusual punishment of the kind prohibited by the Constitution. In reaching this conclusion, the Court stated:

> The Eighth Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed. 2d, 630 (1958). Punishments which are excessive in length or severity or which are in great disproportion to the offenses charged may not be imposed. *Furman v. Georgia*, 408 U.S. 238, 93 S.Ct. 272[illegible], 33 L.Ed. 2d 346 (1972); *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962).
>
> Needless to say, this Court is aware of the Government's argument that no cruel and unusual punishment stems from the actual sentence imposed by the California court. But the overall effect, the reality of the situation, is that petitioner Lieggi and his family will suffer severe punishment

FRIED, FRAGOMEN & DEL REY Tok v. Imm.

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of Feb. 1976 deponent served the within Brief upon:

U.S. Atty. So. District of N.Y.

attorney(s) for
Appellee

in this action, at
1 St. Andrews Plaza, New York, N.Y. 10007

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 6
day of Feb., 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976